

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

V.

AMEREN MISSOURI.

Defendant.

Civil Action No. 4:11-cv-00077-RWS

**PLAINTIFF'S RESPONSE IN OPPOSITION TO
AMEREN MISSOURI'S MOTION TO COMPEL**

The United States respectfully files this opposition to Ameren Missouri's Motion to Compel Discovery of EPA's proposed regulations respecting greenhouse gas emissions. (ECF Doc. 302.) Because the United States is endeavoring to provide the requested discovery to Ameren, the United States respectfully asks this Court to deny Ameren's motion to compel without prejudice as moot.

This case involves multi-million dollar overhauls of Rush Island Unit 1 in 2007 and Rush Island Unit 2 in 2010. As a result of these massive projects, Ameren aspired (and should have expected) that these electric generating units would generate power for more hours per year and at higher levels per hour, and thus would emit more sulfur dioxide pollution per year. Ameren got what it paid for. As a result of these projects, the units ran more hours per year, ran at higher levels, generated more electricity, and emitted hundreds more tons of sulfur dioxide per year.

Faced with these facts, Ameren attempts to argue that – contrary to the company’s own documents and the actual data in this case – the projects it performed were really designed to increase efficiency (not to increase capacity to run at higher levels or availability to run more

hours per year). In its attempt to set for this argument, Ameren's brief is rife with incorrect statements and misrepresentations of the opinions offered by Plaintiff's expert Mr. Koppe. Indeed, in asserting that "Ameren did not expect emissions to increase" (Ameren Br., ECF Doc. 302 at 1), Ameren disregards the fact that its own emission calculation for the 2010 project at issue, even after amending the calculation to factor in efficiency gains that the company purportedly should have expected, *projects a more than 2,000 ton increase of sulfur dioxide emissions* (well over the 40 ton significance level provided for in the regulations). (See Sealed Exhibit A, Amended Reasonable Possibility Analysis). Meanwhile, Ameren disclaims the capacity benefits that the company touted in project approval documents, and proclaims a complete inability to predict the availability of its units. Indeed, it seems that Ameren is only able to predict the future operation of its Rush Island Power Plant to the extent that such predictions might support the company's defenses in this case.

In support of its efficiency arguments, Ameren now seeks broad discovery into EPA's proposed new regulations of greenhouse gases – which are in no way applicable to this case. The discovery that Ameren seeks is objectionable on a number of bases: (1) it is almost entirely without relevance to this case (indeed Ameren withdrew its "greenhouse gases" defense in response to Plaintiff's Motion to Strike, *see* ECF Doc. 86 at 3, n. 3); (2) it threatens to improperly probe protected privileged and deliberative documents and communications respecting a proposed rule of National and international importance that will be subject to exclusive judicial review on the merits in the D.C. Circuit Court when it is finalized pursuant to 42 U.S.C. § 7607(b)(1); (3) it seeks to probe information provided by other electric power companies that is subject to business confidentiality claims; (4) it raises concerns respecting the right of individual EPA employees who have worked on the rule to privacy under the Privacy

Act, 5 U.S.C. § 552a; and (5) it is overly broad and unduly burdensome, including in that the requests ask the United States to compile information that is publicly available in the docket supporting the rulemaking, and which Ameren may obtain itself at no greater effort than that required by EPA to compile the requested information.

Nevertheless, within the parameters of the United States' objections, and consistent with the guidance received from the Court during the July 25, 2014 Status Conference, the United States is providing discovery to Ameren in response to these requests. In light of Plaintiff's efforts to provide the requested discovery, Defendant's motion to compel should be denied without prejudice as moot.

Dated: August 14, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2014, I served the foregoing with the Clerk of Court using the CM/ECF system, which will cause an electronic copy to be served on counsel of record, who are listed below:

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